(25,115)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 832.

EDWARD F. JOHNSON, PLAINTIFF IN ERROR,

vs.

J. D. LANKFORD AND SOUTHWESTERN SURETY INSURANCE COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 30, 1916.

1 THE UNITED STATES OF AMERICA:

To J. D. Lankford and Southwestern Surety Insurance Company, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, D. C., thirty days from and after the day this citation bears date, pursuant to an order allowing a writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Oklahoma, wherein Edward F. Johnson is plaintiff and you are defendants to show cause, if any there be, why the judgment rendered against the said plaintiff as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable John H. Cotteral Judge of the District Court of the United States for the Western District of Oklahoma this 10 day of January, A. D. 1916.

JOHN H. COTTERAL,
Judge of the District Court of the United States for the Western District of Oklahoma.

I, S. P. Freeling, Att'y of Record for the Defendants in Error in the above case, hereby accept service of above citation.

S. P. FREELING,
Att'y Gen. of Oklahoma & Att'y for Def'ts in Error.

Jan. 15, 1916.

[Endorsed:] No. 1501. Citation. Filed Jan. 10, 1916. Arnold C. Dolde, Clerk, by M. V. Haws, Deputy.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the District Court of the United States for the Western District of Oklahoma, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, at the December Term, 1915, thereof, between Edward F. Johnson as plaintiff and J. D. Lankford and Southwestern Surety Insurance Company as defendants, a manifest error hath happened, to the great damage of the said plaintiff as by petition appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the City of

Washington, D. C., and filed in the office of the Clerk of said Court, on or before the 9 day of February, 1916, to the end that the record and proceedings aforesaid being inspected, the said Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 10 day of January in the year of our Lord one thousand nine hundred and sixteen.

Issued at office in Guthrie with the seal of the District Court of the United States for the Western District of Oklahoma and dated as aforesaid.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk of the District Court of the United States,
Western District of Oklahoma.

Allowed by
JOHN H. COTTERAL, *Judge.*

UNITED STATES OF AMERICA,
Western District of Oklahoma, ss:

In obedience to the command of the within Writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of the District Court of the United States for the Western District of Oklahoma.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk of the District Court of the United States,
Western District of Oklahoma.

[Endorsed:] 1501. Filed Jan. 10, 1916. Arnold C. Dolde, Clerk, by M. V. Haws, Deputy.

3 In the District Court of the United States for the Western District of Oklahoma.

E. F. JOHNSON, Plaintiff,
vs.
J. D. LANKFORD and SOUTHWESTERN SURETY INSURANCE COMPANY, a Corporation, Defendants.

Petition.

Comes now the plaintiff and shows the court that he is a citizen of the city of Woburn, in the State and district of Massachusetts:

that J. D. Lankford is a citizen of Oklahoma County of the Western District of the State of Oklahoma; that the Southwestern Surety Insurance Company is a corporation organized under the laws of the State of Oklahoma and doing business therein and is a citizen of Bryan County, in the Eastern District of the State of Oklahoma, with its principal place of business located at Denson, in Bryan County, Oklahoma, authorized to operate and operating under the laws of the said state, a fidelity insurance business at each and all of the times named herein;

That on the 1st day of March, 1911, the defendant, J. D. Lankford was then and there Bank Commissioner of the State of Oklahoma, and that the defendant J. D. Lankford and defendant Southwestern Surety Insurance Company on said date entered into an official Fidelity Bond for said J. D. Lankford as Bank Commissioner in the sum of Twenty Five Thousand Dollars ($25,000.00), unto the State of Oklahoma and other persons interested therein, the condition of said Obligation being among other conditions that he, the said J. D. Lankford, should faithfully and impartially, without fear, favor fraud or oppression, discharge the duties that then or thereafter might be required of his office by law. That said bond was duly approved by the then Governor of the State of Oklahoma and filed in the office of the Secretary of State as required by law, and a true copy thereof with all endorsements thereon is hereto attached marked "Exhibit A." and made a part hereof.

4

That thereafter, about the 19th day of March, 1915, the said J. D. Lankford was duly reappointed Bank Commissioner of said state and thereupon he and the said defendant Southwestern Surety Insurance Company entered into another bond in exactly the same terms and conditions, being a continuation of the former bond the original of Exhibit A and said second bond was signed, executed and delivered on the 19th day of March, 1915, and duly approved by the Governor of said state on the 8th of April, 1915, a copy of which is hereto attached, marked "Exhibit B" and made a part hereof; and by the terms whereof among other things, the said defendants jointly and severally promised that the said J. D. Lankford should faithfully discharge all the duties required of him by law as bank commissioner.

That on the 11th day of October, 1913, the Farmers & Merchants Bank of Mountain View, Oklahoma, was a banking corporation, domestic to the State of Oklahoma, operating at Mountain View, Oklahoma, under the control and supervision of the said J. D. Lankford, as Bank Commissioner, and that said bank on said date, for value received, made, executed and delivered to this plaintiff a certain certificate of deposit whereby it promised to pay to this plaintiff in four months from said date the sum of $5,066.66, together with three per cent interest thereon, upon the certificate being properly endorsed and returned; that on the 20th day of February, 1915, as hereinafter more fully stated, the said Bank commissioner took possession of said Farmers & Merchants Bank and of its assets because of its insolvency, and thereupon the said certificate of deposit was by the owner and holder thereof, this plaintiff, endorsed to Lawrence

Martin for collection, and by him duly presented to said Bank commissioner for payment, and that upon the payment thereof being refused as hereinafter more fully stated, the said Lawrence Martin reendorsed the same, and that the plaintiff herein is now the owner and holder thereof for value and has been such since the date of the certificate; that said certificate together with all endorsements thereon is attached hereto marked "Exhibit C" and made a part hereof.

5 Plaintiff states that under the term sof said bonds Exhibits A and B, it was the duty of said J. D. Lankford, as bank commissioner of said state, to pay the amount owing on said certificate at the time the same was presented to him in February, 1915, and that on the date the same was presented to him about the 20th of February, 1915, there was due the sum of $5,235.60, and that since the presentation of the said certificate for payment, the same has drawn six per cent interest, and on the 20th of August, 1915, there will be due upon the same, the sum of $5,392.67, together with six per cent interest upon the same until paid.

Plaintiff has duly made demand upon the defendant, J. D. Lankford to pay the same, but the defendant, J. D. Lankford, in violation of his duty as bank commissioner fails and refuses to pay the same or any part thereof; that he has violated the terms of said bonds in this to-wit: that he has neither faithfully nor fully performed his duty as bank commissioner in this: That it is and was the duty of said bank commissioner to pay said certificate upon presentation; that said J. D. Lankford as bank commissioner, grossly and entirely failed to perform his duty as bank commissioner in the supervision and control of said Farmers & Merchants Bank, in that though duly informed of the conditions existing in said bank, and having actual knowledge of such facts as would put a reasonable man upon inquiry, he allowed the persons in charge of said bank to squander its assets so as to damage the plaintiff in his right to compel payment from said bank, and that the failure to exercise proper care and supervision by said J. D. Lankford consisted principally in this, that before the time of the making of the said certificate of deposit, and from then continuously up to the time that the said J. D. Lankford took possession of said bank because of its insolvency, he, said J. D. Lankford, with full knowledge of the situation, permitted the persons in charge of said bank to conduct it while its reserve was less than that required by law, and failed to take possession of said bank for the purpose of enforcing said law, or to do anything else adequate and requisite in the premises, that he said, J. D. Lankford, as said

6 bank commissioner allowed the persons in charge of said bank, before the making of said certificate, and thence continuously until the time that he took charge of said bank, for its insolvency, to make excessive loans in violation of the law and thereby to squander the assets of the bank to the plaintiff's detriment; that he, said J. D. Lankford before the making of the said certificate and thence continuously until the time he took possession of the said bank allowed the persons in charge of said bank to squander its assets by allowing the making of overdrafts; that he the said J. D. Lankford as bank commissioner, before the time of the making of

the said certificate and thence continuously until the time the said bank had become wholly insolvent, and only sixty days before the time that he, the said J. D. Lankford took possession of same for its insolvency, well knew that the management of said bank was in the hands of incompetent, and inefficient persons and allowed the same to be controlled and managed by them inefficiently, incompetently and without economy to the great damage of the assets of said bank. And such squandering of assets thus occurred in such amount as to deprive the plaintiff of all opportunity of recovering the same out of the property of the bank.

Plaintiff states that the said bank commissioner was by law authorized to visit every domestic bank chartered under the laws of the state of Oklahoma and it was his duty either in person or by his assistants, to visit the same at least twice each year and as much oftener as was advisable, for the purpose of making a full and careful examination and inquiry into the conditions of affairs of such bank, and for that purpose, the bank commissioner and his assistants were by law authorized and empowered to administer oaths and to examine under oath the stockholders and directors or officers and employees and agents of such bank, or other persons, and that the commissioner was by law required to reduce the result of such examination to writing and that the law directs that such writing should contain a full, true and correct statement of the condition of such bank and that the same should be filed and retained in his office, and thereby the said bank commissioner had the means of learning and did actually know all of the matters heretofore stated; that the law authorized the bank commissioner to call for reports under oath from the officers of the bank at least four times a year and as much oftener as he deemed it necessary.

7 Under the laws of the State of Oklahoma, every bank doing business under said laws therein, was required to have on hand at all times in available funds the following sums, to-wit: Banks located in towns or cities having a population of less than twenty five hundred persons, an amount equal to twenty per cent of their entire deposits; that the town of Mountain View in which said Farmers & Merchants Bank was operating, was of less than twenty five hundred persons at each and all of the times named herein, but that said bank never from the time of the making of said certificate until the time that the bank commissioner took possession of the same, at any time had available fund in amount equal to twenty per cent of the amount of its entire deposits. That under the law of the state of Oklahoma, applicable to such bank whenever the reserve of any such bank should be below the required amount of available funds, the law prohibited the making of any new loans or discounts, otherwise than in the discounting of bills of exchange, payable at sight, but that said provision of law was by said bank from the time of the making of said certificate until the time that the said bank commissioner took possession of same, continuously and notoriously violated as the said J. D. Lankford, bank commissioner then and there well knew.

That under the provision of law applicable thereto the said bank

commissioner was required by law to notify any bank, whose legal money reserve should be below the amount required to be kept on hand, and if the bank should fail to repair the same for a period of thirty days after such notice, under the law, such bank was to be deemed insolvent, and it was the duty of such bank commissioner to take possession of the same and proceed to liquidate the same as provided by law for the liquidation of insolvent banks; that though the said bank commissioner frequently made demands upon said bank to repair its said reserve, that the said reserve was never repaired in fact and that said bank repeatedly and habitually failed to repair the same within thirty days as the said bank commissioner well knew and had reasonable cause to believe, and ample opportunity to discover, and it thereupon became the duty of the said bank
8 commissioner to take possession of said bank before the time that said certificate was issued and at all the times thereafter until the time that he took possession of the same in February, 1915, but this duty was by him, in violation of his said bond, without just excuse, continuously postponed and delayed until the month of February, 1915, when the assets of said bank were so squandered and depleted as to be insufficient to pay the claim of the plaintiff.

Under the law of the state of Oklahoma applicable thereto it was provided that the total liabilities to any bank of any person, corporation, or firm, for money borrowed, including in the liabilities of such company or firm the liabilities of the several stockholders, officers, or members thereof, should not at any time exceed twenty per cent of the capital stock of such bank, that the capital stock of the said Farmers & Merchants Bank was the sum of $10,000, but that as the said bank commissioner well knew, the officers and persons in control of said bank before the making of the said certificate, and thence continuously until a short time before the bank commissioner took possession of the same, loaned from its funds more than twenty per cent of the capital stock of said bank; that these violations of law were habitual and continuous as the said bank comissioner well knew, and thereupon it became the duty of the said bank commissioner to take possession of the said bank and liquidate the same as insolvent, and that without justifiable cause or excuse in violation of his duty as bank commissioner, and in violation of his said bond, he postponed and delayed taking possession of said bank until the — day of February, 1915, and until the assets of said bank were so squandered and depleted as to leave insufficient to pay the claim of said plaintiff.

That before the time that said certificate was issued, the said Farmers & Merchants bank was insolvent; that the market value of its assets were insufficient to pay its liabilities, that it was unable to meet the demands of its creditors in the usual and customary manner and that it was unable to make good its reserve as required by law, and that each of these things were to the said bank commis-
9 sioner well known or he had ample and full opportunity to learn the same, and that it was his duty before the making of said certificate to have taken possession of said bank for insolvency. That because of such excessive loans, such habitual overdrafts, such failure to keep the reserve required by law, and such inefficient man-

agement and such insolvency of said bank as aforesaid, the capital stock of said bank became impaired as the said J. D. Lankford bank commissioner, well knew, and it thereupon became the duty of said bank commissioner to cause the same to be repaired or to take possession of said bank at once, and that neither of said things were done by said bank commissioner, and the said bank was allowed to continue in the wasting of its said assets until insufficient remained to repay plaintiff and thereby damaging the plaintiff in said sum.

That finally in the month of February, 1915, the said bank commissioner took possession of said bank because of its insolvency and proceeded to take possession of all of its assets and to wind up its affairs as a bank, to collect its dues and to pay its debts and thereupon in due course the claim of the said plaintiff under said certificate was presented to said bank commissioner and without justifiable excuse by him, disallowed, and payment thereof refused in violation of law and in violation of the aforesaid bonds made by him, said J. D. Lankford, by them, the said Southwestern Surety Insurance Company as surety for him; and that said refusal was wrongful, willful and oppressive, and was an abuse of the discretion vested in him as bank commissioner in that there was no cause whatever to question the validity of said claim, but on the contrary all of the facts which he the said Lankford had before him in regard thereto showed the same to be a valid and legal claim against the depositors' guaranty fund of the state of Oklahoma.

That the law of the state of Oklahoma requires that when a bank under its laws becomes insolvent, that the bank commissioner shall take possession of same, and pay its depositors in full, and when the cash available in said bank, or that can be made immediately available for that purpose is not sufficient to discharge its obligations to its depositors, it is provided by law that the banking board of the state of Oklahoma shall draw from the depositors' guaranty fund and place subject to the use of the bank commissioner the amount necessary to make up the deficiency and that the state of Oklahoma shall have for the benefit of the depositors' guaranty fund, a first lien upon the assets of said bank, and all liabilities against the stockholders, officers, or directors of said bank and against all other persons, corporations, or firms for the advance so made from the said depositors' guaranty fund, and that all such liabilities shall be enforced by the state for the benefit of said depositors' guaranty fund and that by reason of said provision of law after the said J. D. Lankford, bank commissioner, took possession of said bank, the state of Oklahoma, thereby acquired a first lien upon all the assets of the said bank to recoupe the advanced amount necessary to be made from said depositors' guaranty fund, and that under the said law it is the duty of the said bank commissioner to pay the amount owing on the certificate to the said plaintiff, and to recoupe the same out of the assets of said bank under the said provisions of law as aforesaid.

That the enforcement of the said laws of the State of Oklahoma, in the matters herein complained of were and are solely through and by said defendant, J. D. Lankford as Bank Commissioner and the same have been in this case interpreted and enforced by him in such

wise as to deny this plaintiff the equal protection of the laws in violation of the 14th amendment to the Constitution of the United States in this,—that said Bank Commissioner arbitrarily, capriciously and without legal justification has interpreted and enforced said laws as investing him with the arbitrary power to determine what deposits should be paid out of said available assets of said failed bank and what out of said depositors' guaranty fund and to make this determination unequally and not under the equal protection of the law in that he has determined as aforesaid that no payment or payments shall be made out of the available assets of said failed bank in his possession to plaintiff or out of the said depositors' guaranty fund in satisfaction of said certificate of plaintiff, but that other and different depositors of said failed bank with no greater or different rights,

11 whose claims and the amounts of whose deposits are unknown to the plaintiff but known to the said defendant Bank commissioner, but of the same class and legal condition and situation as the deposit of this plaintiff, were and have been paid by him both out of the available cash resources of said failed bank and out of said depositors' guaranty fund, and for this, said law as thus enforced affords the plaintiff no remedy for correction of said determination by judicial review and thereby gives to said other depositors an unequal and more advantageous enforcement of the law than to plaintiff, this to plaintiff's damage.

Further said bank commissioner having arbitrarily and capriciously and without justification therefor, illegally determined what deposits shall be paid out of the available cash assets of said failed bank, and for what deposits advancements shall be made from the depositors' guaranty fund, does and did also to plaintiff's damage likewise capriciously and arbitrarily interpret and enforce said laws, so that he, said defendant Bank Commissioner, determined for himself for what amount he shall and should and does hold the assets of said failed bank and does and did impress upon the assets of said failed bank said first lien for recoupement to the State of Oklahoma, ahead of and superior to the lien of plaintiff thereon, in so large a sum that said assets are insufficient to pay the same or to leave anything to repay plaintiff for his said debt. And because the state of Oklahoma is immune from suit by plaintiff he has no remedy by judicial review to correct such illegal determination by defendant bank commissioner, either of the superiority of any of said other preferred creditors or of the whole or aggregate amount thereof as represented in said preferred liens to the state, ahead of plaintiff's liens thereby he, said defendant J. D. Lankford acting for said state as bank commissioner, deprives and deprived plaintiff of his property without due process of law in violation of the 14th Amendment to the Constitution of the United States, by illegally disallowing plaintiff's claim and illegally allowing said other illegally preferred depositors and giving them and the state of Oklahoma in lieu of them, said first lien aforesaid, and in all of these matters thereby breaching the said obligation in said bonds, Exhibits A and B aforesaid.

12 Therefore by failure to perform the promises made for the benefit of this plaintiff in the said bonds, Exhibits A and B

the said plaintiff has been by the defendants, damaged in the sum of $5,235.60 on the 20th day of February, 1915, together with six per cent interest thereon, until the same shall be paid, amounting on the 20th of August, 1915, to the sum of $5,392.67.

Plaintiff was entirely without knowledge, notice, or information, of any of the matters or things above stated, except such as appeared upon the face of said certificate when he received the same, and the fact that he knew of the existence of a bank commissioner, charged in general with the duties and powers aforesaid and because of this knowledge and because of this lack of knowledge relying upon the full performance by the defendant, bank commissioner of his duties, the plaintiff without fault on his part, allowed the moneys represented by said certificate to remain in said bank after the same became due, and upon said certificate nothing has ever been paid or allowed by way either of principal or interest.

Wherefore plaintiff prays judgment against defendant for the sum of $5,235.60, together with six per cent interest thereon from the 20th day of February, 1915, until the same shall be paid and for costs of this action.

E. F. JOHNSON, *Pl'f.*
By WEST, HULL & HAGAN,
His Att'ys.

13 *Official Bond.*

Southwestern Surety Insurance Company.

General Offices, Durant, Oklahoma.

STATE OF OKLAHOMA,
Oklahoma County, ss:

Know all men by these presents: that we, J. D. Lankford, as Principal, and the Southwestern Surety Insurance Company (a corporation) of Durant, Oklahoma, as Sureties, are held and firmly bound unto the State of Oklahoma, in the penal sum of Twenty Five Thousand Dollars for the payment of which we bind ourselves, our heirs, executors and administrators.

The condition of the above obligation is: That, whereas the above bounden J. D. Lankford has been appointed Bank Commissioner in and for the State of Oklahoma,

Now, if the said J. D. Lankford shall render a true account of his office and of the doings therein to the proper authority, when required thereby or by law; and shall promptly pay over to the person or officers entitled thereto all money which may come into his hands by virtue of his said office; and shall faithfully account for all the balances of money remaining in his hands at the termination of his office; and shall hereafter exercise all reasonable diligence and care in the preservation and lawful disposal of all money, books, papers and sureties, or other property appertaining to his said office, and deliver them to his successor, or to any person authorize- to receive the same, and if he shall faithfully and impartially, without fear,

favor, fraud, or oppression, discharge all other duties now or hereafter required of his office by law, then this bond to be void; otherwise in full force.

Signed this 1st day of March, A. D. 1911.

SOUTHWESTERN SURETY INSURANCE COMPANY,
By H. W. PENTECOST, *Assistant Secretary.*

Approved March Eighth, 1911.
LEE CRUCE, *Governor.*

1029. Official Bond, J. D. Lankford,

This instrument was filed for record this 26th day of Nov. A. D. 1913, at 11.15 o'clock A. M. Recorded in Ex. Record No. 8, at page 477.

BENJAMIN F. HARRISON,
Secretary of State.

Exhibit A.

14 *Official Bond.*

Southwestern Surety Insurance Company.

General Offices, Durant, Oklahoma.

No. 0-2521.

STATE OF OKLAHOMA,
Oklahoma County, ss:

Know all men by these presents: That we, J. D. Lankford, as principal, and The Southwestern Surety Insurance Company, a corporation of the State of Oklahoma, as Sureties are held and firmly bound unto the State of Oklahoma, in the penal sum of Twenty Five Thousand Dollars ($25,000) for the payment of which we bind ourselves, our heirs, executors, and administrators.

The Condition of the above obligation is: That Whereas, the above bounden J. D. Lankford has been appointed Bank Commissioner in and for the State of Oklahoma,

Now, if the said J. D. Lankford shall render a true account of his office and of the doings therein to the proper authority, when required thereby or by law; and shall promptly pay over to the person or officers entitled thereto all money which may come into his hand by virtue of his said office; and shall faithfully account for all the balances of money remaining in his hands at the termination of his office; and shall hereafter exercise all reasonable diligence and care in the preservation and lawful disposal of all money books, papers, and sureties, or other property appertaining to his said office, and deliver them to his successor, or to any person authorized to receive the same, and if he shall faithfully and impartially, without fear, favor, fraud, or oppression, discharge all other duties now or here-

after required of his office by law, then this bond to be void; otherwise in full force.

Signed this 19th day of March, A. D. 1915.

(Signed) J. D. LANKFORD, *Principal.*
SOUTHWESTERN SURETY INSURANCE COMPANY,
By H. W. PENTECOST,
Attorney-in-Fact, Sureties.

Approved April 8th, 1915.

R. L. WILLIAMS,
The Governor of the State of Okla.

Endorsed: No. 1258, official Bond, J. D. Lankford.

This instrument was filed for record this 8th day of April, A. D. 1915, at 11:15 o'clock A. M. Recorded in Ex. Record No. 10 at page 380.

J. L. LYON,
Secretary of State.

Exhibit B.

15 No. 683.

$5,066.66.

MOUNTAIN VIEW, OKLA., Oct. 11, 1913.

This Certifies, that Lawrence Martin, has deposited with Farmers & Merchants National Bank Five Thousand Sixty Six and 66/100 Dollars, payable to the order of E. F. Johnson, in four months from date, on the return of this Certificate properly endorsed. Interest at the rate of 3% from date.

Not over Six Thousand Dollars $6,000$.

E. C. MORRIS, *Cashier.*

Certificate of Deposit, Not Subject to Check.

Endorsed: Pay to the Order of Lawrence Martin, E. F. Johnson. Pay to the order of E. F. Johnson, Lawrence Martin.

Exhibit C.

Endorsed: No. 1501. Action at Law. E. F. Johnson *vs.* J. D. Lankford, et al. Petition. Filed Aug. 5, 1915. Arnold C. Dolde, Clerk, by Frank T. McCoy, Deputy.

16 In the District Court of the United States for the Western District of Oklahoma.

No. 1501.

E. F. JOHNSON, Plaintiff,
vs.
J. D. LANKFORD and SOUTHWESTERN SURETY INSURANCE COMPANY, a Corporation, Defendants.

Motion to Dismiss Petition.

Now come the defendants, J. D. Lankford, and the Southwestern Surety Insurance Company, a corporation, by S. P. Freeling, Attorney General of the State of Oklahoma, and appearing for the purposes of this motion only, and move the Court to quash the writ of summons issued herein on the 5th day of August, 1915, and dismiss plaintiff's petition, for the following reasons.

I.

That the defendant, J. D. Lankford, is now and has been at all times mentioned in said petition, the Bank Commissioner of the State of Oklahoma, and all of the acts alleged to have been performed by said J. D. Lankford are alleged to have been performed by him as Bank Commissioner of the State of Oklahoma, and that said petition discloses that said action is an action against J. D. Lankford, a Bank Commissioner of the State of Oklahoma.

II.

That by reason of said action being against J. D. Lankford, by reason of acts performed by him in his capacity as Bank Commissioner of the State of Oklahoma; that this Court has no jurisdiction in the subject of said action or of the persons of the defendants, said suit being one against an officer of the State of Oklahoma, and in fact and in law against the State of Oklahoma, without its consent, and in violation of the provisions of the Eleventh Amendment to the Constitution of the United States.

17 III.

That J. D. Lankford, personally, and the defendant, Southwestern Surety Insurance Company, had no personal interest in the subject matter of said cause, and had no interest personally, or otherwise in the subject of said suit.

Wherefore, Defendants pray the judgment of the Court whether they shall further answer, and that said cause may be dismissed for

want of jurisdiction in this Honorable Court, and that the defendants herein may have their costs.

S. P. FREELING,
Attorney General of the State of Oklahoma.
J. I. HOWARD,
Assistant Attorney General,
Attorneys for Defendants.

Endorsed: No. 1501. In the District Court of the United States for the Western District of Oklahoma. E. F. Johnson, Plaintiff, vs. J. D. Lankford, and Southwestern Surety Insurance Company, a corporation, Defendants. Motion to Dismiss Petition. Filed Sept. 6, 1915. Arnold C. Dolde, Clerk, by Frank T. McCoy, Deputy.

18 In the District Court of the United States for the Western District of the State of Oklahoma.

No. 1501.

E. F. JOHNSON, Plaintiff,
vs.
J. D. LANKFORD et al., Defendants.

Motion to Amend.

Comes now the plaintiff and asks leave of the court to amend his petition by the insertion of the following amendment at the end of the cause of action before the prayer:

Plaintiff says further that said act as administered by said defendant J. D. Lankford as bank commissioner acting therein under the authority of the said State of Oklahoma, violates the second section of the Fourth Article of the Constitution of the United States and deprives the plaintiff of the privileges and immunities due him in the State of Oklahoma, as a citizen of the State of Massachusetts in this to-wit:

That as aforesaid said J. D. Lankford as said bank commissioner has heretofore allowed and paid the deposits of numerous depositors in said failed bank, which depositors were citizens of the State of Oklahoma, but otherwise similarly situated as is the plaintiff, that the names of said depositors and the amount of their said deposits is not known to the plaintiff but is known or at least accessible to the defendant J. D. Lankford Bank Commissioner; that said depositors in said failed bank that are citizens of the State of Oklahoma, this plaintiff believes amounts to, and so he avers the fact to be, at least ninety odd per cent of the amount of the deposits in said bank at the time it failed, and that said depositors who were citizen-
19 of the State of Oklahoma at the time said bank failed, the said bank commissioner has allowed the deposits of all or almost all but arbitrarily and without just excuse as aforesaid refuses to allow or pay the deposit of the plaintiff; and for the deposits which said bank commissioner allows and pays under the said law

of the state as aforesaid, a first lien upon the assets of said bank is claimed and maintained by the State of Oklahoma, through the said defendant J. D. Lankford, bank commissioner and the claiming and the maintenance of said lien postpones the collection of the claim of the plaintiff and hinders, delays and prevents the payment of the same for the reason that after the repayment of the said first lien, the assets of the said bank will not be sufficient to pay the claim of the plaintiff and this discrimination between the plaintiff and other depositors of the said failed bank similarly situated as is the plaintiff, except that they are citizens of the State of Oklahoma, abridges the said second section of Art. IV. of the Constitution of the United States in that it denies to him as a citizen of Massachusetts the privileges and immunities that are allowed to the citizens of the State of Oklahoma in that State,

And furthermore, the said allowance of the deposits of the said citizens of the State of Oklahoma aforesaid similarly situated to that of the plaintiff, and the denial and disallowance of the claim of the said plaintiff arbitrarily and without just excuse as aforesaid and the postponement of the collection of the claim of the plaintiff thereby wrought and the prevention and hindrance to the collection of the claim of the plaintiff as aforesaid wrought by said discrimination because of the laying of the said lien by the State of Oklahoma of an amount equal to the amount advanced by it to the payment of the claims of the depositors by it paid as aforesaid, also violates the Fourteenth Amendment to the Constitution of the United States in this, to-wit: that thereby the State of Oklahoma enforces a law which abridges the privileges and immunities of a citizen of the United States, to wit, the plaintiff, in failing to accord to him the same protection under equal laws of the governmental power of the State of Oklahoma as is accorded to said citizens of the State of Oklahoma, depositors in said failed bank, otherwise situated similar to the plaintiff, whose deposits were paid by said bank commissioner.

CHAS. WEST AND
H. H. HAGAN,
Attorneys for Plaintiff.

Endorsed: No. 1501. In the U. S. District Court for the Western District of Oklahoma. E. F. Johnson, Plaintiff, vs. J. D. Lankford, et al., Defendants. Motion to Amend. Filed Dec. 31, 1915. Arnold C. Dolde, Clerk, by Frank T. McCoy, Deputy.

21 In the District Court of the United States for the Western District of the State of Oklahoma.

E. F. JOHNSON, Plaintiff,

vs.

J. D. LANKFORD and SOUTHWESTERN SURETY INSURANCE COMPANY, a Corporation, Defendants.

Journal Entry.

On this the 1st day of January, 1916, the same being one of the regular judicial days of the Special December term of this court, the plaintiff being present by Chas. West his attorney and the defendants by J. I. Howard, Assistant Attorney General, the motion of the defendants to Dismiss the Action as one against the State of Oklahoma without its consent in violation of the Eleventh Amendment to the Constitution of the United States comes on to be heard, and pending the decision of said motion, the plaintiff is allowed according to his request on file to amend his petition by the addition of the amendment already on file, and now the court being duly advised as to said motion of the defendants, sustains said motion to dismiss said action, to which the plaintiff at the time duly excepts. And thereupon the court doth hereby dismiss this action at the costs of plaintiff, to which the plaintiff excepts at the time, and thereupon in open court the plaintiff notifies defendants of his intention to apply to this court for a writ of error in this action to the Supreme Court of the United States, the question of jurisdiction alone being involved in the said decision just rendered.

JOHN H. COTTERAL,
District Judge.

O. K.
WEST.

O. K.
J. I. HOWARD,
Att'y for Def.

Endorsed: Filed Jan. 1, 1916. Arnold C. Dolde, Clerk, by M. V. Haws, Deputy.

22 In the District Court of the United States for the Western District of the State of Oklahoma.

No. 1501.

EDWARD F. JOHNSON, Plaintiff,
vs.
J. D. LANKFORD and SOUTHWESTERN SURETY INSURANCE COMPANY, a Corporation, Defendants.

Petition for Allowance of Writ of Error Directed to the Supreme Court of the United States on the Question of Jurisdiction.

The plaintiff, Edward F. Johnson, respectfully represents that there is manifest error committed to his injury by the judgment pronounced in this case on the 1st day of January, 1916, in and by which final judgment this court refused jurisdiction of the cause set forth in the plaintiff's petition on the ground that this was in effect a suit against the State of Oklahoma of which this court had no jurisdiction by reason of the provisions of the Eleventh Amendment to the Constitution of the United States and on said ground, the court on said January 1, 1916, entered a final judgment dismissing this cause for want of jurisdiction. A prayer for the reversal of said judgment is hereto attached to be transmitted to said appellate court.

Wherefore, plaintiff, Edward F. Johnson, considering himself aggrieved, prays an order granting a writ of error from said final judgment denying jurisdiction as aforesaid to the Supreme Court of the United States as authorized by Section 238, of the Act of Congress of the United States, approved March 3, 1911; and plaintiff refers to his assignment of errors now on file in which he separately and particularly sets out each error asserted and intended to be urged and the plaintiff prays this honorable court to allow said writ of error and that a transcript of so much of the record, proceed-

23 ings and papers upon which said judgment was made as may be necessary to present said question of jurisdiction on appeal duly authenticated may be sent to the Supreme Court of the United States. The plaintiff hereafter files and offers its bond in the penal sum of Three Hundred Dollars ($300.00) for said writ of error and asks that same be approved and the writ of error be allowed.

CHAS. WEST,
H. H. HAGAN,
Attorneys for Plaintiff.

Endorsed: No. 1501. Edward F. Johnson vs. J. D. Lankford et al. Petition for allowance of Writ of Error. Filed Jan. 10, 1916. Arnold C. Dolde, Clerk, by M. V. Haws, Deputy.

24 To the Honorable the Supreme Court of the United States:

No. —.

EDWARD F. JOHNSON, Plaintiff in Error,
vs.
J. D. LANKFORD and SOUTHWESTERN SURETY INSURANCE COMPANY, a Corporation, Defendant- in Error.

Now comes Edward F. Johnson, the plaintiff in error and prays for a reversal of the judgment of the District Court of the United States for the Western District of the State of Oklahoma, in an action brought by plaintiff in error as plaintiff against the defendants in error as defendants, which judgment was entered in the office of the Clerk of said court on the 1st day of January, 1916.

CHAS. WEST,
Of Oklahoma City, Okla., Attorney for Plaintiff in Error, Edward F. Johnson, of Woburn, Mass.

Endorsed: Filed Jan. 10, 1916. Arnold C. Dolde, Clerk, by M. V. Haws, Deputy.

25 In the District Court of the United States for the Western District of Oklahoma.

No. 1501.

EDWARD F. JOHNSON, Plaintiff,
vs.
J. D. LANKFORD and SOUTHWESTERN SURETY INSURANCE COMPANY, a Corporation, Defendants.

Assignment of Errors.

Comes now the plaintiff Edward F. Johnson by Charles West, and H. H. Hagan, his attorneys, and says that in the record and proceedings in the above entitled cause there is manifest error in this, to-wit:

I.

The District court of the United States for the Western District of Oklahoma, erred in holding and deciding that said court as a court of the United States had no jurisdiction to try and determine this action and in rendering this judgment dismissing the same for the want of such jurisdiction.

II.

That said court erred in holding and deciding that this was in fact an action against the state of Oklahoma without its consent and

in violation of the Eleventh Amendment to the Constitution of the United States.

III.

The court erred in holding and deciding that a personal action for damage done plaintiff by the defendant J. D. Lankford in failing to perform the official duties required of him by law as bank commissioner of the State of Oklahoma to be performed for
26 the benefit of plaintiff, and the consequent action based upon such failure and damage against said J. D. Lankford and defendant Southwestern Surety Insurance Company as his surety was in effect one against the State of Oklahoma.

IV.

The court erred in holding and deciding that the personal action for damage done plaintiff by defendant, J. D. Lankford, in arbitrarily and without just cause disallowing his claim as a depositor in a failed bank in the state of Oklahoma, and in allowing the claims of other depositors situated in all respects similarly to that of plaintiff except that they were citizens of the State of Oklahoma, and in making such decision without evidence, without notice, without a hearing provided by law, without an opportunity afforded by law for judicial review of his action therein, and making said allowances and disallowances while he himself, said J. D. Lankford, was acting as Receiver for said failed bank and in placing a first lien upon the assets of said failed bank for the amount of said allowances, to the hindering and delaying of plaintiff in the collection of his claim out of the assets of said failed bank thus depriving him of property without due process of law in violation of the 14th Amendment to the Constitution of the United States and depriving him, a citizen of Massachusetts of his privileges and immunities in the State of Oklahoma in violation of the second section of the Fourth Article of the Constitution of the United States, and the consequent action based upon said facts against said J. D. Lankford and Southwestern Surety Insurance Company as his surety, was in effect one against the state of Oklahoma.

CHARLES WEST,
HORACE H. HAGAN,
Attorneys for Plaintiff.

Endorsed: No. 1501. Edward F. Thompson vs. J. D. Lankford et al. Assignment of Errors. Filed Jan. 10, 1916. Arnold C. Dolde, Clerk, by M. V. Haws, Deputy.

27 In the United States District Court for the Western District of Oklahoma.

No. 1501.

EDWARD F. JOHNSON, Plaintiff,
vs.
J. D. LANKFORD and SOUTHWESTERN SURETY INSURANCE COMPANY, a Corporation, Defendants.

The plaintiff's petition having been dismissed by judgment of this court on the sole ground that this court as a court of the United States had no jurisdiction of the cause and the plaintiff having prayed a writ of error to the Supreme Court of the United States on said question of jurisdiction, and that said question be certified to said Supreme Court of the United States, it is now ordered in open court that the said writ of error be allowed on the question only from the final order and decree dismissing said action for want of jurisdiction and is further ordered that so much of the record proceedings and papers upon which said judgment was made as are necessary to present this question of jurisdiction and no more be included in the record on appeal.

JOHN H. COTTERAL,
Judge District Court of the United States for the Western District of Oklahoma.

Endorsed: Filed Jan. 10, 1916. Arnold C. Dolde, Clerk, by M. V. Haws, Deputy.

28 Know all men by these presents, That we, Edward F. Johnson and Lawrence Martin, are held and firmly bound unto J. D. Lankford and Southwestern Surety Insurance Company, in the full and just sum of Three Hundred & no/100 ($300.00) Dollars to be paid to the said J. D. Lankford and Southwestern Surety Insurance Company, heirs, executors, administrators, successors or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors or assigns, jointly and severally by these presents. Sealed with our seals, and dated this 10th day of January in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately at the December term of the District Court of the United States for the Western District of Oklahoma in a suit depending in said Court between Edward F. Johnson, plaintiff, and J. D. Lankford and Southwestern Surety Insurance Company, defendants, a judgment was rendered against the said Edward F. Johnson and the said Edward F. Johnson has obtained a writ of error of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said J. D. Lankford and Southwestern Surety Insurance Company citing and admonishing them to be and appear in the

Supreme Court of the United States, at the City of Washington, D. C., thirty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said Edward F. Johnson shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

EDWARD F. JOHNSON,
By CHAS. WEST. [SEAL.]
LAWRENCE MARTIN. [SEAL.]
—— ——. [SEAL.]

Approved by
JOHN H. COTTERAL,
Judge United States District Court,
Western District of Oklahoma.

Endorsed: Filed Jan. 10, 1916. Arnold C. Dolde, Clerk, by M. V. Haws, Deputy.

29 In the District Court of the United States for the Western District of Oklahoma.

No. 1501.

EDWARD F. JOHNSON, Plaintiff,
vs.
J. D. LANKFORD and SOUTHWESTERN SURETY INSURANCE COMPANY, a Corporation, Defendants.

Præcipe for Transcript of Record.

To the Clerk of the United States District — for the Western District of Oklahoma:

You will please incorporate into the transcript of the record on the Writ of Error of the above case to the Supreme Court of the United States, the following portions of the record:

The Citation to be issued herein requiring defendants to appear in the Supreme Court of the United States on this Writ of Error and proof of service thereof.

The Original petition,

The Motion of defendants to Dismiss the petition,

The application of the plaintiff to amend his petition

The order of the court sust-ining the application to amend and sustaining the motion to dismiss and dismissing the petition.

The petition for Writ of Error

The order of the court allowing such Writ of Error

The Prayer for reversal

The undertaking on appeal

The assignment of errors

This præcipe for transcript of record.

CHAS. WEST,
Attorney for Plaintiff.

Received a copy and acknowledge service of the above Præcipe this the 10 day of January, 1916.

S. P. FREELING,
Att'y General,
By J. I. HOWARD,
Ass't Attorney General of the State of Oklahoma,
Attorney for Defendants.

The above præcipe is satisfactory to me.
Dated January 10, 1916.

S. P. FREELING,
Att'y General,
By J. I. HOWARD,
Ass't Att'y Gen.

Endorsed: Filed Jan. 10, 1916. Arnold C. Dolde, Clerk, by M. V. Haws, Deputy.

30 UNITED STATES OF AMERICA,
Western District of Oklahoma, ss:

I, Arnold C. Dolde, Clerk of the District Court of the United States for the Western District of Oklahoma, do hereby certify the foregoing to be a full, true and complete transcript of the pleadings, record and proceedings in said court in case No. 1501, wherein E. F. Johnson, is plaintiff and J. D. Lankford and Southwestern Surety Insurance Company, a corporation, are defendants, as full, true and complete as the said transcript purports to contain, and as called for by the præcipe for transcript of the record above set forth.

I further certify that the original citation and the original writ of error are hereto attached and are herewith returned with the transcript of the record in said cause.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at office in the City of Guthrie in said Western District of Oklahoma this 25th day of January, A. D. 1916.

[Seal of the United States District Court, Western District of Oklahoma.]

ARNOLD C. DOLDE,
Clerk of the District Court of the United States
for the Western District of Oklahoma,
By M. V. HAWS, *Deputy.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled 1-25-16. A. C. D., M. V. H.]

Endorsed on cover: File No. 25,115. W. Oklahoma D. C. U. S. Term No. 832. Edward F. Johnson, plaintiff in error, vs. J. D. Lankford and Southwestern Surety Insurance Company. Filed January 29th, 1916. File No. 25,115.

JOHNSON *v.* LANKFORD ET AL.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 96. Submitted December 18, 1917.—Decided January 28, 1918.

An action against the Bank Commissioner of Oklahoma personally and his surety to recover damages for the loss of plaintiff's bank deposit, alleged to have been due to the Commissioner's failure to safeguard the business and assets of the bank, and his arbitrary, capricious and discriminating refusal to pay the claim or allow it as valid against the state Guaranty Fund, all in continuous, negligent or wilful disregard of his duties under the state law, *held*, not an action against the State, but within the jurisdiction of the District Court, there being diversity of citizenship. *Lankford* v. *Platte Iron Works Co.*, 235 U. S. 461, distinguished.

Allegations to the effect that the enforcement of the state laws in the matters complained of was solely through the Commissioner, and that he so arbitrarily and capriciously exercised his powers as to deprive plaintiff of the equal protection of the laws and deprive plaintiff of his property without due process, etc., *held*, not to change the complexion of the action, no relief being prayed against the Guaranty Fund.

Reversed.

ACTION for the sum of $5,235.60, with interest, for the failure of defendant in error Lankford to perform his duty as bank commissioner of Oklahoma, in consequence of which plaintiff in error sustained loss in the amount stated. Southwestern Surety Insurance Company, an Oklahoma corporation, was surety on the official bond of Lankford.

Defendants, defendants in error here, moved to dismiss the action on the ground of want of jurisdiction in the court, the action being "one against the State of Oklahoma without its consent, in violation of the Eleventh Amendment to the Constitution of the United States."

The court granted the motion, reciting that it was upon

the ground stated and that the question of jurisdiction was alone involved in its decision, and subsequently allowed a writ of error to review that question only.

Plaintiff in error (we shall refer to him as plaintiff) is a citizen of the State of Massachusetts. The defendants in error are citizens of the State of Oklahoma.

The petition of plaintiff is, in outline, as follows:

Lankford, in March, 1911, then being bank commissioner of Oklahoma, and again in March, 1915, entered into official bonds with the insurance company as surety in the sum of $25,000 for the faithful performance of his duties as required by law.

On October 11, 1913, the Farmers & Merchants Bank of Mountain View, Oklahoma, a domestic banking corporation under the control and supervision of Lankford as bank commissioner, for value received, executed and delivered to plaintiff a certificate of deposit for the sum of $5,066.66, with interest at 3%.

February 20, 1915, Lankford, as bank commissioner, took possession of the bank and of its assets because of its insolvency. Thereupon plaintiff endorsed the certificate to one Martin for collection, who presented the same to Lankford for payment. Payment being refused, Martin re-endorsed the same to plaintiff. Under the terms of the bonds given by Lankford it was his duty as commissioner to pay the certificate of deposit at the time it was presented to him. By refusal to so pay it, and his refusal afterward to pay upon the demand of plaintiff, he, Lankford, grossly and entirely failed to perform his duty, and being informed of the conditions of the bank and having means of knowledge he allowed the persons in charge of it to squander its assets so as to damage plaintiff in his right to compel payment from the bank. He, Lankford, also failed to exercise proper care and supervision in that before the making of the certificate of deposit and thence continuously up to the time he took possession of the bank,

with full knowledge of the situation, he permitted the persons in charge of it to conduct it while its reserve was less than that required by law, and failed to take possession of it for the purpose of enforcing the law, or to do anything else adequate and requisite in the premises. He also permitted it while insolvent to make excessive loans and allow overdrafts in violation of law. And, knowing that it was in the hands of incompetent and inefficient persons, he allowed it to be controlled and managed by them inefficiently and incompetently and without economy, to the great damage of its assets, and plaintiff thereby was deprived of all opportunity of recovering the amount of his certificate out of its property.

Lankford failed to make the visits to the bank which the law of the State required him to make or exact the reports which the law required him to exact. He permitted it to reduce the funds which the law required it to have and failed to notify it of the deficiencies or to require it to repair them.

It was his duty to have taken possession of the bank, but he delayed to do so until February, 1915, when its assets were so squandered and depleted as to be insufficient to pay plaintiff's claim. He knew of the violations of law by its officers and of its insolvency.

It was his duty after he took possession to pay plaintiff's claim but he arbitrarily and capriciously refused, in violation of law and his bonds, and there was no cause whatever for him to have questioned the certificate as a valid claim against the Guaranty Fund of the State, which was available under the law of the State for the payment of claims against the bank.

The laws of the State have been so interpreted and enforced by him as to deny plaintiff the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States and he has exercised this power so arbitrarily and capriciously that other depositors

of the same class and condition of plaintiff have been paid out of the available cash resources of the bank and the Guaranty Fund, and because the State is immune from suit plaintiff has no remedy by judicial review and Lankford, acting for the State as bank commissioner, has deprived plaintiff of his property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States by illegally preferring other depositors to plaintiff, thereby breaching the obligation of his bonds.

By failure to perform the promises made for the benefit of plaintiff in the bonds, he has been damaged by defendants in the sum of $5,235.60, on February 20, 1915, together with 6% interest thereon, amounting, August 20, 1915, to the sum of $5,392.67.

Plaintiff was without knowledge of the delinquencies of Lankford and the condition of the bank and, without fault on his part, allowed the moneys represented by the certificate to remain in the bank after the same became due.

Judgment was prayed for the amounts above specified.

Mr. Charles West for plaintiff in error. See *Martin* v. *Lankford*, *infra*, 547, 548.

No brief filed for defendants in error.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court.

Whether the District Court had jurisdiction was necessarily to be determined by reference to the case made by the petition. Hence we have given it at some length, omitting repetitions. It will be observed that the basis of the action is the neglect of duty of Lankford as bank commissioner, by which plaintiff has been damaged to the amount of his certificate of deposit. The insurance com-

pany has been made a party defendant because it has guaranteed the faithful performance of his duties, a statute of the State, it is contended, making it liable. Whether the contention is tenable or whether the petition or the case is defective in any particular we are not called upon to say. Upon neither question was the judgment of the District Court defensively invoked. The sole question for our consideration then is whether the cause of action stated is one against the State of which the District Court has no jurisdiction.

There is certainly no assertion of state action or liability upon the part of the State, and no relief is prayed against it. The charges are all against Lankford. The relief sought is against him because of his wilful or negligent disregard of the laws of the State, and it is because of this his surety is charged with liability, it having guaranteed his fidelity.

We think the question, therefore, should be answered in the negative; that is, that the action is not one against the State. To answer it otherwise would be to assert, we think, that whatever an officer does, even in contravention of the laws of the State, is state action, identifies him with it and makes the redress sought against him a claim against the State and therefore prohibited by the Eleventh Amendment. Surely an officer of a State may be delinquent without involving the State in delinquency, indeed, may injure the State by delinquency as well as some resident of the State, and be amenable to both.

The case is not like *Lankford* v. *Platte Iron Works Co.*, 235 U. S. 461. There the effort was to compel the payment of a claim (certificates of deposit issued by a bank) out of the fund to which the State had a title and which it administered through its officers. Any demand upon it was a demand upon the State and a suit to enforce the demand was a suit against the State, necessarily precluded by the purpose of the law. The case at bar is not of such

character. Its basis is Lankford's dereliction of duty, a duty enjoined by the laws of the State, and the dereliction is charged to have been continuous, overlooking violations of the requirements of law by the bank officials by which it was brought to insolvency, knowing of the depletion of its assets, knowing of the reduction of its reserves, and not requiring their repair. A further dereliction is charged after Lankford took possession and such arbitrary conduct and preferences that plaintiff's claim was subordinated to other claims of like character.

The present case finds example in *Hopkins* v. *Clemson College*, 221 U. S. 636, where the college was held liable for acts of trespass upon private property, and it was said by Mr. Justice Lamar, speaking for the court, that immunity from suit was a "high attribute of sovereignty—a prerogative of the State itself—which cannot be availed of by public agents when sued for their own torts." And it was further said, "The Eleventh Amendment was not intended to afford them [public agents] freedom from liability in any case where, under color of their office, they have injured one of the State's citizens." And a distinction was marked between such acts and such as affect the State's political or property rights.

One charge in the petition will justify special comment. It is that the enforcement of the laws of Oklahoma in the matters complained of was and is solely through and by Lankford as bank commissioner and that he so arbitrarily and capriciously exercised his powers as to deprive plaintiff of the equal protection of the laws and to give to "other depositors an unequal and more advantageous enforcement of the law than to plaintiff, this to plaintiff's damage." And also it is alleged that Lankford's conduct in that particular deprived plaintiff of his property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

The purpose of the allegations is not very clear. They

might be considered as intended for emphasis of the wrongful conduct of Lankford; but they seem to be made more of than this in the argument of counsel, and we are left in doubt whether they are pleaded as independent grounds of recovery or only as elements with other grounds. It is somewhat impossible to regard them as the former, for no special relief is asked on account of them. They represent completed acts the injury of which has been accomplished, the plaintiff losing by them access to the Guaranty Fund or its security, and hence Lankford is charged with personal liability. But no relief, as we have said, is prayed against the fund. If it were, *Lankford* v. *Platte Iron Works Co., supra*, might apply.

Judgment reversed and cause remanded for further proceedings in accordance with this opinion.